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338-860—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1148

JESSIE HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1969. A petition for rehearing was denied on February 7, 1969. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 20, 1969, and, on March 11, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory provision contained in 21 U.S.C. 174, which permits a jury to infer unlawful importation of heroin and knowledge of such importation from proof of possession, violates the privilege against self-incrimination.

2. Whether the trial court's charge explaining the statutory inference was proper.

3. Whether petitioner was adequately represented by trial counsel.

4. Whether reference by the prosecution to the fact that petitioner was arrested on a warrant issued on an indictment constituted reversible error.

5. Whether the trial court improperly denied petitioner's access to Jencks Act material where no request was made for the production of such material.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of concealing 23.775 grams of heroin, in violation of 21 U.S.C. 174. On February 12, 1968, he was sentenced to imprisonment for ten years. The court of appeals affirmed (Pet. App. A).

On October 18, 1967, Federal Narcotics Agent Carl Jackson and State Inspector John Karstan, having a warrant for petitioner's arrest, maintained surveillance near his home. At approximately 6:00 p.m., petitioner drove into an alley, and Jackson and Karstan drove up behind his car. As the agents left their car and approached petitioner's automobile, they ob-

served him reach down and appear to place something underneath the seat. Jackson told petitioner that he was under arrest, and asked him what he had placed under the seat. When petitioner denied that he had placed anything there, Jackson reached under the seat and recovered a small manila envelope which contained heroin (Tr. 6–9; R. 21–22).[1]

Petitioner testified in his own behalf that the agents had not obtained any manila envelope from his car (Tr. 97).

ARGUMENT

1. For the first time in the court of appeals, petitioner challenged the constitutionality of the statutory inference of 21 U.S.C. 174, allowing the jury to infer from proof that a defendant possessed heroin that the heroin was illegally imported and that the defendant knew it to be illegally imported.[2] That challenge presents no issue warranting further review by this Court.

The statutory inference has uniformly been sustained on the ground that the conclusion inferred rationally follows from the facts proved. See *Yee Hem* v. *United States,* 268 U.S. 178; *Morgan* v. *United States,* 391 F. 2d 237 (C.A. 9), certiorari denied, 393

[1] References are to the record ("R."), the transcript of trial ("Tr."), and to the transcript of the pre-trial proceedings ("R. Tr.").

[2] In terms that inference provides: "Whenever on trial for a violation of [21 U.S.C. 174] the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

U.S. 853.[3] The argument that the statutory inference compels a defendant to take the stand in violation of his privilege against self-incrimination was fully answered by this Court in *Yee Hem, supra,* at 185:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Cf. *Roviaro* v. *United States,* 353 U.S. 53, 63.

The recent self-incrimination decisions of this Court arose in entirely different contexts and did not

[3] The statutory inference, the rationality of which is presently before the Court in *Leary* v. *United States*, No. 65, this Term, involves the marijuana importation statute (21 U.S.C. 176a) and not the heroin importation provision involved here.

purport to undercut the validity of *Yee Hem*. Nor can petitioner successfully bring himself within the reach of those decisions by arguing that the inference compelled him to take the stand and admit the possession of narcotics in violation of state law. In this case, petitioner's sole defense was that the officers had not found any heroin in his automobile, and he took the stand to so testify.

2. The court charged the jury without objection as follows:

> Three essential elements are required to be proven beyond a reasonable doubt charged in the indictment: First, the act or acts of concealing or in any manner facilitating the concealment or transportation of the narcotic drug as alleged, which narcotic drug has been imported or brought into the United States contrary to law as charged; second, doing such act or acts with knowledge that the narcotic drug has been imported or brought into the United States contrary to law; and, third, doing such act or acts knowingly, unlawfully and fraudulently [Tr. 210–211].
>
> * * * * *
>
> There is a second provision in the statute under which the defendant is charged. It states in part:
>
> "Whenever on trial for a violation of this section, the defendant is shown to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence unless the defendant explains the possession to the satisfaction of the jury."

> By reason of this statute I charge you if the evidence in this case shows beyond a reasonable doubt that the defendant knowingly had possession of the narcotic drug as charged, *then it is not necessary for the government to prove that the drug was imported or brought into the United States contrary to law or that the defendant knew that the drug was imported or brought into the United States contrary to law.* The defendant's possession alone raises a presumption that the narcotic drug was so unlawfully imported and that the defendant had knowledge of this fact and the burden is upon the defendant to rebut the presumption to your satisfaction [Tr. 212–213; emphasis added].

Seizing upon the language emphasized above, petitioner contends that the instruction had the improper effect of removing the elements of importation and knowledge thereof from the jury's consideration. In so arguing, however, petitioner fails to account for the instruction directly following. There the court explained (Tr. 213–214):

> The statute does not change the fundamental rule that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, nor does it impose upon a defendant the burden of producing proof that the narcotic drug was lawfully imported or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt beyond a reasonable doubt. The statute means that upon a trial for a violation thereof, if the jury should find from the evidence beyond a reasonable doubt that a defendant has had possession of

> the narcotic drug, the fact of such possession alone, unless explained to the satisfaction of the jury, *permits* the jury to draw the inference and find that the narcotic drug was imported contrary to law and to draw the further inference and find that the defendant had knowledge that the narcotic drug was imported contrary to law [Tr. 213; emphasis added].

When the charge is viewed in its entirety, it is apparent that the court, in the language complained of, simply meant that the government need not prove the fact of importation and knowledge thereof by evidence independent of the inference drawn from proof of possession; and, in the instruction which immediately followed, the court pointed out that the inference was permissive, not mandatory. Since petitioner failed to object to this language, further review is not warranted. Rule 30, F.R. Crim. P.

3. Petitioner was not denied effective assistance of counsel. On January 9, 1968, Antonio M. Gassaway, Esq., was appointed by the court to represent petitioner. On February 6, 1968, Mr. Gassaway advised the court that he had another trial scheduled for the same time, and said that his associate, Mr. Durham, would handle the present case (P. Tr. 21–22). That afternoon, Mr. Durham entered his appearance and indicated that he would be ready to proceed the following day (P. Tr. 24).* Trial began the following morning. Petitioner now points to this substitution of counsel on the day before trial, and

*The record indicates that petitioner agreed to this substitution (P. Tr. 24).

other minor occurrences during trial, in support of a claim that he was denied effective assistance of counsel. None of these points, however, supports that conclusion.

Although Mr. Durham filed his appearances one day before trial, the record clearly indicates that—as Mr. Gassaway's partner—he was fully prepared to begin the next day. The fact that no motion to suppress was filed does not support the conclusion that counsel was incompetent. Petitioner was arrested under a warrant of arrest for narcotics violations. He was observed—just prior to arrest—placing something under the automobile seat. Under these circumstances, it was clear that the limited and specific search immediately after his arrest was reasonable, and that it would have been pointless to file a motion to suppress. Indeed, the failure to file a motion to suppress was completely consistent with the defense that no heroin was recovered from the automobile.

Nor does the fact that counsel failed to submit voluminous requests for instructions, that counsel asked for a short recess to discuss matters with his client at the conclusion of the government's case, or that counsel failed to file post-trial motions, indicate a less than adequate representation at trial. Given the relatively simple nature of the two day trial, voluminous requests for instructions were not warranted. A defense request for a short recess prior to putting on its case—especially when a defendant is preparing to testify in his own behalf—hardly demonstrates a lack of preparation for trial. And in view of the fact

that Mr. Durham apparently had been replaced within the time within which to file post-trial motions,[5] his failure to do so is not probative of any dereliction of duty.

4. In the opening statement, the government prosecutor stated, *inter alia* (Tr. 3):

> The facts as the government will present them to you are relatively simple. We will show that late in the afternoon of October 18, 1967, some agents of the Federal Bureau of Narcotics, knowing that legal process existed for the arrest of defendant Jesse Hoskins, did in fact arrest him at approximately 6:20 p.m.
>
> That incidental to this arrest,—he was arrested in his car,—there was found in his possession and under his control 23.775 grams of heroin.

On direct examination, narcotic agent Carl Jackson testified that—prior to the discovery of the heroin—he had informed petitioner that he was under arrest for a violation of the federal narcotics laws and that there was a warrant on file for his arrest (Tr. 8). On cross-examination of Jackson, the following took place (Tr. 37):

> Q. You were there to pick him up on an entirely different matter, weren't you?
>
> A. I was there to arrest him pursuant to an indictment and a warrant.
>
> Mr. DURHAM (defense counsel): I didn't ask that. I move that be stricken. This witness has

[5] The verdict was returned on February 12, 1968. On February 19, Howard W. Minn, Esq., entered an appearance in behalf of petitioner and filed a notice of appeal (R. 29).

> testified in court before and I asked him a simple question. He is trying to get something to this jury that I don't think they are entitled to hear.

The trial court—although disagreeing with the defense characterization that the witness deliberately injected the fact of the prior indictment—ordered the answer stricken (Tr. 37–38).

As the court of appeals held, the mentioning of the arrest warrant and indictment does not constitute reversible error. Although it is settled that evidence of a prior crime is inadmissible to establish the probable guilt or innocence of the accused, *Michelson* v. *United States,* 335 U.S. 469, there is an exception to that rule when the evidence of the crime is so blended or connected with the crime on trial that proof of one incidentally involves the other. *United States* v. *McCartney,* 264 F. 2d 628, 631 (C.A. 7), certiorari denied, 361 U.S. 845; *United States* v. *Levine,* 372 F. 2d 70, 72 (C.A. 7), certiorari denied, 388 U.S. 916. Here, in order to give a meaningful and complete presentation of the facts, it was incumbent upon the government to show why the agents followed petitioner's automobile and placed him under arrest.

5. During cross-examination, Federal Narcotics Agent Charles Hill testified that his supervisors had been aware of the fact that he was maintaining a surveillance near petitioner's home on the day of his arrest, and that he was in radio communication with

his office throughout the day (Tr. 138–139). Defense counsel than asked (Tr. 139):

> Q. Now I want to know if you know whether or not your office has any custom as to records they keep with reference to where any agent is employed or what he is doing at any given time.

An objection to the question by the prosecutor was sustained by the court. After a second attempt was terminated by the court, the following colloquy took place (Tr. 140):

> Q. Your Honor, I am trying—my client has testified three people were in the car. How can I establish whether or not there were two or three?
>
> The COURT: I am only ruling on the propriety of one question. It is objectionable as a matter of law in my opinion, that is all, regardless of what you are trying to do.
>
> Mr. DURHAM: Yes, I understand, your Honor. I appreciate your ruling. I withdraw the question.

Petitioner now contends that the line of questioning terminated by the court constituted an attempt to lay a foundation for the obtaining of Jencks Act (18 U.S.C. 3500) material,[6] and that the trial judge committed reversible error in halting that attempt. This argument, however, is clearly refuted by the representation of defense counsel that he was seeking an

[6] In response to an identical question, Agent Hill had earlier testified that he did not know whether his office had a custom of keeping a record of the whereabouts of various agents from time to time (Tr. 138).

answer to the question for a wholly different purpose. Petitioner can not now complain that the trial court failed to respond to a request which was never made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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